

CAUSE NO. 03-18-00759-CR

IN THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS AUSTIN DIVISION	FILED IN 3rd COURT OF APPEALS AUSTIN, TEXAS 7/16/2019 5:49:31 PM JEFFREY D. KYLE Clerk
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JESSIE LEE BROOKS, JR.	§
	§
v.	§
	§
THE STATE OF TEXAS	§

APPELLANT'S BRIEF

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- a. CRCF [Clerk’s Fee—\$40.00]
- b. JRF [Jury Reimbursement Fee—\$4.00]
- c. IDF [Indigent Defense Fee—\$2.00—10% only]
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STATEMENT OF THE CASE

Nature of the Case: This is an appeal from a conviction, following a jury trial, for aggravated assault by threat with a deadly weapon.¹ (I C.R. 5; 118-119; 143-144).

Judge/Court: Judge John Youngblood, 20th District Court, Milam County. (I C.R. 118-119; 143-144).

Pleas: Not Guilty. (3 R.R. 102-103) (I C.R. 118-119; 143-144). Not true to the enhancements. (6 R.R. 12) (I C.R. 104-105; 118-119; 143-144).

Trial Court Disposition: The jury found Appellant guilty, (5 R.R. 139) (I C.R. 103; 118-119; 143-144), and the Court, on Appellant's election have the judge assess punishment, (I C.R. 92), found the State's enhancements true, (6 R.R. 40) (I C.R. 118-119; 143-144), sentenced Appellant as a habitual offender² to thirty years imprisonment. (6 R.R. 40) (I C.R. 118-119; 143-144).

ISSUES PRESENTED

ISSUE ONE: The evidence is legally insufficient to convict Appellant of aggravated assault by threat because the State failed to prove Appellant threatened the victim.

ISSUE TWO: The following court costs assessed against Appellant are facially unconstitutional because they violate the Separation of Powers provision of the Texas Constitution:

a. CRCF [Clerk's Fee—\$40.00]

¹ Tex. Pen. Code § 22.02(a)(2); Tex. Pen. Code § 22.01(a)(2).

² Tex. Pen. Code § 12.42(d).

- b. JRF [Jury Reimbursement Fee—\$4.00]
- c. IDF [Indigent Defense Fee—\$2.00—10% only]
- d. CRTF [Administrative Transaction Fee—\$4.00]
- e. Serving Writ [SRWT—\$35.00]

ISSUE THREE: Should this Court modify the judgment to reduce the amount of money owed, the withdrawal order must be modified accordingly so as to give effect to this Court’s conclusions.

ISSUE FOUR: The judgment contains the following clerical errors that should be modified to make the record speak the truth:

- a. The “degree of offense” recites that Appellant was convicted of a first-degree felony, when the degree of his offense is, in fact, a second-degree felony;
- b. The judgment shows pleas of “True” to the enhancements when Appellant pleaded “Not True” to both enhancements.

STATEMENT OF FACTS³

Lisa Grayson accused Appellant of choking her and beating her with a “two-by-four board” on the night of August 15, 2017. (4 R.R. 160; 163-165). She could not explain what caused this attack, maintaining, in fact, that she “didn’t even talk

³ Because Appellant’s legal sufficiency challenge is tailored to the State’s proof of a threat, Appellant tailors this factual summary accordingly and does not detail evidence of bodily injury. *See* Tex. R. App. P. 38.1(g) (“The brief must state concisely and without argument *the facts pertinent to the issues or points presented.*”) (emphasis added).

to him” and did not “recall talking to him” before it happened. (4 R.R. 164; 190) (7 R.R. Defendant’s Ex. 9) (10:10 or so (does not know why Appellant “tripped” but suspects jealousy because she received money from her “baby daddy”) and at 15:00 or so (saying the incident “just happened”)). Nor was she, according to her testimony,⁴ kicked out of Appellant’s house. (4 R.R. 193). Instead, Appellant “jumped” on her, (4 R.R. 174; 186-187; 205) (7 R.R. Defendant’s Ex. 9) (e.g., beginning at 3:03 or so and 7:13 or so), hitting her with the two-by-four “constantly”, causing the “partial on [her] tooth” to come out and, because she tried to protect herself, her hand to bruise and bleed. (4 R.R. 164-165; 173; 205) (7 R.R. State’s Ex. 1 and 2). She contended that she fell, “grabb[ing] both of his hands”, and Appellant then “like literally choked [her] real hard” such that she could barely breathe. (4 R.R. 165) (7 R.R. State’s Ex. 2 (“Patient was also choked by her boyfriend for about a minute and has pain over her trachea”). Grayson ended up on the floor, where Appellant continued hitting her. (5 R.R. 41).

Her written voluntary statement given to the police the day after the incident was admitted into evidence, through a police officer, over hearsay and Confrontation Clause objections. (4 R.R. 53-57). To support its admissibility, the State maintained that Grayson would testify, thereby presenting no Confrontation Clause issue, (4 R.R. 55-56); that Appellant’s counsel opened the door through his

⁴ Both her written statement and her roadside interview with the police suggest she previously maintained otherwise. (7 R.R. State’s Ex. 1; Defendant’s Ex. 9).

opening statement,⁵ (4 R.R. 55-56); and that there was no hearsay problem because “it’s a recorded recollection of the event” and it “goes to state of mind”. (4 R.R. 56).

The statement recites that Appellant locked her out of the house after she went to her car to get Advil, and that once she tried to get back in the house Appellant started choking her so hard that she could not breathe. (4 R.R. 57) (7 R.R. State’s Ex. 1). “[T]hen he grabbed a board and started hitting me so hard I told Jessie he was hurting me. So he told me I need to hit [sic] so he kept hitting me with the board. Then after that he started hitting my fingers until they started bleeding.” (4 R.R. 57) (7 R.R. State’s Ex. 1).⁶

Grayson received medical treatment that night, (4 R.R. 62-65) (7 R.R. State’s Ex. 2), and afterwards police pulled her over where her roadside interview was recorded on a bodycam. (7 R.R. Defendant’s Ex. 9). She never mentioned Appellant threatening her,⁷ nor did she indicate that Appellant made a non-verbal

⁵ Appellant’s counsel told the jury that Grayson “also never told the police officer that she had been choked or her breath had been impeded, the legal language.” (4 R.R. 49). The State argued the door had been opened “because he’s attacked her credibility, said she gave different statements, said she never told police that she was choked and that’s false.” (4 R.R. 56).

⁶ The statement itself contains grammatical errors, so the quotation is from the witness’ reading—and interpretation—of the statement, cleaned up a bit. (4 R.R. 57) (e.g., “So he told me I need to hit – I believe – so he kept hitting me....”).

⁷ Grayson did testify to Appellant “like threaten[ing]” her at one time, but this was with respect to a different incident not forming the basis of either the choking or the two-by-four offense. (4 R.R. 162-163).

threat before attacking her. (7 R.R. Defendant's Ex. 9). In her testimony, she contended Appellant beat her frequently if not every day. (4 R.R. 181-183; 187).

The police pulled Grayson over because Appellant asserted she had tried to break through his window and remove his air conditioner, and that is why he hit her with a stick. (7 R.R. Defendant's Ex. 1-8). Grayson denied Appellant's account. (4 R.R. 173-174; 190-191).

As a result of the above, Appellant was indicted for aggravated assault by threat with a deadly weapon⁸ as well as family violence assault by strangulation.⁹ (I C.R. 5) (3 R.R. 101-102). In the aggravated assault by threat indictment, the State alleged that Appellant "did then and there intentionally or knowingly threaten Lisa Grayson...with imminent bodily injury by telling her that he was going to end her life". (I C.R. 5). The jury found Appellant not guilty of the strangulation allegation, (5 R.R. 139), but guilty of the aggravated assault allegation. (5 R.R. 139).

Appellant chose to go to the Court for punishment. (I C.R. 92). The State sought to enhance Appellant to a habitual offender,¹⁰ (I C.R. 104-105), and Appellant pleaded "Not True" to both enhancements. (6 R.R. 12). The Court,

⁸ Tex. Pen. Code § 22.02(a)(2); Tex. Pen. Code § 22.01(a)(2).

⁹ Tex. Pen. Code § 22.01(a)(1); Tex. Pen. Code § 22.01(b)(2)(B).

¹⁰ Tex. Pen. Code § 12.42(d).

however, found the State’s enhancements true and sentenced Appellant to thirty years in TDCJ. (6 R.R. 40) (I C.R. 118-119; 143-144).

In orally pronouncing sentence, the judge also stated that “Court costs will be ordered as well.” (6 R.R. 40). However, he did not itemize these court costs in open court. (6 R.R. at 40). Neither did the judgment do so. (I C.R. 118-119; 143-144). The judgment contains aggregate court costs in the amount of \$279, (I C.R. 118-119; 143-144), and the judge’s Order to Withdraw Funds appears¹¹ to order the same amount to be withdrawn from Appellant’s inmate trust account. (I C.R. 116).

The clerk’s itemized bill of costs, dated July 3, 2019, contains, among others, the following court costs:

- f. CRCF [Clerk’s Fee—\$40.00]
- g. JRF [Jury Reimbursement Fee—\$4.00]
- h. IDF [Indigent Defense Fee—\$2.00—10% only]
- i. CRTF [Administrative Transaction Fee—\$4.00]
- j. Serving Writ [SRWT—\$35.00]

(I Suppl. C.R. 3).

Appellant challenged the facial constitutionality of these court costs through a first amended motion for new trial filed within thirty days of the imposition of

¹¹ The handwritten amount in the Order to Withdraw Funds should be \$279 to conform to the judgment, but the handwriting is hard to decipher and may be \$259. (I C.R. 116).

sentence, (I C.R. 118-119; 137-140; 143-144), and the judge denied the motion by written order. (I C.R. 141).

Appellant's judgment describes the degree of the offense as a first-degree felony. (I C.R. 118-119; 143-144). The judgment also recites that Appellant pleaded true to both enhancement paragraphs. (I C.R. 118-119; 143-144).

SUMMARY OF THE ARGUMENT

ISSUE ONE: The evidence is legally insufficient to convict Appellant of aggravated assault by threat because the State failed to prove Appellant threatened the victim.

Attacking someone without first threatening them is a different assaultive offense from assault by threat. The State charged Appellant with aggravated assault by threat, but not aggravated assault causing bodily injury. Accordingly, for the evidence to be legally sufficient, the State had to prove that Appellant intentionally or knowingly threatened Grayson with imminent bodily injury.

In this case the State alleged a verbal threat but did not prove it: not only did Grayson not testify that Appellant threatened to kill her (or make any verbal threat at all), she testified that she did not speak to him before the assault and that he simply, and more-or-less unaccountably, "jumped" on her. Thus, whether or not the State must prove the exact verbal threat alleged in the indictment, the State did not prove *any* verbal threat at all.

A threat may be non-verbal as well, but a hypothetically-correct jury charge would not incorporate a non-verbal threat because an aggravated assault predicated on a verbal threat and an aggravated assault predicated on a non-verbal threat are separately chargeable offenses, and Appellant was prepared to defend against an allegation of a verbal threat. Still, even if the hypothetically-correct jury charge would allow for a conviction based on a non-verbal threat as well, notwithstanding the indictment, the evidence does not show that Appellant made any non-verbal threatening gesture before assaulting Grayson ,nor did he make one during the assault: he simply “jumped” on her and began beating her with a board until she bled.

As a consequence, while Appellant may be guilty, on this record, of some assaultive offense, he is not guilty, on this record, of the assaultive offense with which he was charged. Therefore, the evidence is legally insufficient, and his conviction for aggravated assault by threat with a deadly weapon must be vacated.

Ordinarily, after a reviewing court finds the evidence legally insufficient to support the charged offense, the court is required to reform the conviction to a lesser-included offense, if possible. In this case, there is no lesser-included offense of which the jury necessarily found Appellant guilty in the course of convicting him of the charged offense for which the evidence is legally sufficient. Therefore, Appellant is entitled to an acquittal outright.

ARGUMENT

A. Standard of Review¹²

In *Lucio v. State*, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011), the Texas Court of Criminal Appeals describes the standard of review for evidentiary sufficiency challenges:

In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). This “familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Jackson*, 443 U.S. at 319. “Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction.” *Hooper*, 214 S.W.3d at 13.

Id.

Reviewing all the evidence includes evidence that was properly and improperly admitted. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001). And if the record supports conflicting inferences, reviewing courts presume

¹² See *Brock v. State*, 495 S.W.3d 1, 15 (Tex. App.—Waco 2016, pet. ref’d) (from which statement of standard of review in subsections A and B is more or less tracked).

that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793. Furthermore, direct and circumstantial evidence are treated equally: “Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt.” *Hooper*, 214 S.W.3d at 13. And, while it is well established that the factfinder is entitled to judge the credibility of the witnesses and can choose to believe all, some, or none of the testimony presented by the parties, *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991), a factfinder’s prerogative to believe some evidence over others will not sustain a verdict where that belief is irrational in light of the rest of the evidence. *Brooks v. State*, 323 S.W.3d 893, 907 (Tex. Crim. App. 2010) (“A hypothetical that illustrates a proper application of the *Jackson v. Virginia* legal-sufficiency standard is [sic] robbery-at-a-convenience-store case: The store clerk at trial identifies A as the robber. A properly authenticated surveillance videotape of the event clearly shows that B committed the robbery. But, the jury convicts A. It was within the jury’s prerogative to believe the convenience store clerk and disregard the video. But based on *all* the evidence the jury’s finding of guilt is not a rational finding.”) (emphasis in original) (quoting *Johnson v. State*, 23 S.W.3d 1, 15 (Tex. Crim. App. 2000) (McCormick, P.J., dissenting)).

B. Hypothetically Correct Jury Charge

The “sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State’s burden of proof or unnecessarily restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant was tried.” *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). “‘As authorized by the indictment’ means the statutory elements of the offense as modified by the charging instrument.” *Ramjattansingh v. State*, 548 S.W.3d 540, 546 (Tex. Crim. App. 2018).

C. The Element of Threat

1. Assault-By-Threat versus Assault-Causing-Bodily Injury

The only element of the offense that Appellant challenges is that which requires a threat of imminent bodily injury. A person commits aggravated assault if he commits an assault that causes serious bodily injury to another or uses or exhibits a deadly weapon during the assault. Tex. Pen. Code § 22.02(a)(1)-(2). One way a person commits assault is when he “intentionally or knowingly threatens another with imminent bodily injury”. Tex. Pen. Code § 22.01(a)(2). This was the way, and the only way, the State alleged Appellant committed the assault. (I C.R. 5).

Causing bodily injury to another without first threatening him is a “different assaultive offense” than assault-by-threat. *Olivas v. State*, 203 S.W.3d 341, 342 (Tex. Crim. App. 2006) (“We conclude that *McGowan* held only that assault by threat requires the defendant to communicate a threat of imminent bodily injury; stabbing someone without first threatening him is a different assaultive offense.”). Likewise, aggravated assault based on an underlying assault causing bodily injury is a “separate crime” from aggravated assault based on an underlying assault-by-threat. *Landrian v. State*, 268 S.W.3d 532, 540 (Tex. Crim. App. 2008) (“three different courts of appeals properly held that simple ‘bodily injury’ assault is a separate and distinct crime from simple assault by threat. Thus aggravated assault under each distinct assaultive crime is a separate crime: aggravated assault with the underlying crime of assault by causing bodily injury and aggravated assault with the underlying crime of assault by threat.”) (footnote omitted). Thus, a person may be innocent of assault-by-threat even though he is manifestly guilty of assault causing bodily injury. *McGowan v. State*, 664 S.W.2d 355, 358 (Tex. Crim. App. 1984) (“There is no evidence that prior to stabbing her appellant threatened her in any way. She never saw appellant holding a knife nor did she testify that appellant threatened her with a knife. Finally, the evidence shows that after appellant stabbed Mrs. Mack, he fled. Thus, we are constrained to hold that the evidence is

insufficient in Cause No. 65,965, to show aggravated assault by threats even though it shows bodily injury.”).

2. Verbal *or* Non-Verbal?

In this case, the State alleged that Appellant threatened Grayson “by telling her that he was going to end her life”. (I C.R. 5). “It is well established that threats can be conveyed in more varied ways than merely a verbal manner.” *McGowan*, 664 S.W.2d at 357. Thus, generally speaking a “threat may be communicated by action or conduct as well as words.” *Id.*

However, while the State might not have been limited in this case to proving the specific verbal threat alleged in the indictment—that is, that those particular words¹³ were used—it is arguable that the State is limited to proving a *verbal* threat, because assault (and thus aggravated assault) by threat is a “conduct-oriented offense”, *Landrian*, 268 S.W.3d at 540, meaning that Appellant could be

¹³ The specific threat alleged in the indictment may be surplusage that, because it was alleged with respect to an essential element of the offense, formerly the State would have been required to prove under the *Burrell* exception. *Burrell v. State*, 526 S.W.2d 799, 802 (Tex. Crim. App. 1975) (“There is, however, a well recognized exception to the general rule discussed above, and that is where the unnecessary matter is descriptive of that which is legally essential to charge a crime it must be proven as alleged, even though needlessly stated.”), *overruled by Gollihar v. State*, 46 S.W.3d 243 (Tex. Crim. App. 2001). *Gollihar v. State*, 46 S.W.3d 243, 250 (Tex. Crim. App. 2001). However, the *Burrell* exception was overruled in *Gollihar*, so perhaps the State need not prove the unnecessary allegation, which will itself present a problem only if it creates a fatal variance or a material variance between the allegations in the indictment and the proof offered at trial. *Gollihar v. State*, 46 S.W.3d 243, 256-257 (Tex. Crim. App. 2001) (explaining when a fatal variance is present). Because there is no evidence in this case of *any* threat—verbal or non-verbal—that preceded the attack, the Court need not decide whether the specific words alleged in the indictment are surplusage or not, or whether the State is limited to proving a verbal threat only.

charged with as many instances of aggravated assault by threat as there were types of threats made. *See Huffman v. State*, 267 S.W.3d 902, 907 (Tex. Crim. App. 2008) (“if the focus of the offense is the conduct—that is, the offense is a ‘nature of conduct’ crime—then different types of conduct are considered to be separate offenses.”). In other words, a verbal threat (saying “I’ll kill you” to one victim) is one instance of assault-by-threat, while a non-verbal threat (brandishing a knife in the same victim’s face) is another instance of assault-by-threat, *Id.*, and a defendant could be charged with aggravated assault by threat based on either (or both) threats. Hence, in this case, the State seems to have been bound to prove a verbal threat (though perhaps not the particular words alleged), because otherwise a fatal or material variance would be present since Appellant prepared to defend against an allegation of a verbal threat alone and would be subject to prosecution for aggravated assault by threat again. *See Gollihar v. State*, 46 S.W.3d 243, 257 (Tex. Crim. App. 2001) (whether a fatal or material variance is present is determined by considering whether the indictment “informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial, and whether prosecution under the deficiently drafted indictment would subject the defendant to the risk of being prosecuted later for the same crime.”); (4 R.R. 16) (prosecutor contends the specific verbal threat, although “superfluous language”, was included in the indictment “[t]o give the defendant notice of what he’s charged

with”). “Allegations giving rise to immaterial variances may be disregarded in the hypothetically correct charge, but allegations giving rise to material variances must be included.” *Id.* Because the variance here seems to be material, the State’s allegation that the threat was verbal cannot be disregarded in a legal sufficiency challenge even though the State may not be bound to prove the precise words used. *Id.*

However, because there is no evidence of *any* threat—verbal or non-verbal—preceding the attack, the Court need not decide whether the specific words alleged in the indictment are surplusage or not, nor whether the State is in fact limited to proving a verbal threat rather than a non-verbal one. Even if the State is allowed to establish the offense through recourse to a non-verbal threat, there is no evidence of any such threat preceding the attack.

In any event, the threat, verbal or non-verbal, must precede the attack. *Olivas*, 203 S.W.3d at 342.

D. Application: No evidence of a communicated threat

Here, it is clear that Appellant made no verbal threat at all before assaulting Grayson. In fact, she testified she did not talk to Appellant before the attack, (4 R.R. 164; 190) (7 R.R. Defendant’s Ex. 9) (10:10 or so (does not know why Appellant “tripped” but suspects jealousy because she received money from her “baby daddy”) and at 15:00 or so (saying the incident “just happened”)), and

generally describes the attack as being spontaneous: repeatedly, she says that Appellant just “jumped” on her. (4 R.R. 174; 186-187; 205) (7 R.R. Defendant’s Ex. 9) (e.g., beginning at 3:03 or so and 7:13 or so). Perhaps the closest thing to a verbal threat in the record is the ambiguous language in her written statement, where she wrote that “I told Jessie that he was hurting me so he told me I need to Hit”. (7 R.R. State’s Ex. 1). But this ungrammatical, confusing statement (even the police officer was unsure what she meant) (4 R.R. 57) is not a threat under any of its possible interpretations: either it means Appellant told Grayson that she (“I” being Grayson) needs to hit (back?), which makes little or no sense, or it means that Appellant told Grayson that *he* (“I” being Appellant) needed to beat her (“need to Hit”), which is not a threat but a (twisted) compulsion. In short, the record contains no verbal threat, making this Court “constrained to hold that the evidence is insufficient...to show aggravated assault by threats even though it shows bodily injury.” *McGowan*, 664 S.W.2d at 358.

The evidence is also insufficient to show that Appellant threatened Grayson non-verbally rather than just beat her with a board. As explained above and described in the Statement of Facts, this was simply a case of assault causing bodily injury that involved a two-by-four as a deadly weapon, but it was not such an assault that was preceded by a threatening gesture or action. Replace “stabbed” with “bludgeoned” and you have this case: “the defendant just stabbed her, he did

not threaten her first.” *Olivas*, 203 S.W.3d at 349 (so describing *McGowan*) (footnote omitted). But, “there must be *some* evidence of a threat being made to sustain a conviction of assault by threat.” *Id.* (emphasis in original).

Appellant may be guilty of aggravated assault based on an underlying assault causing bodily injury, but he is not guilty of the “separate crime” of aggravated assault based on an underlying assault-by-threat. *Landrian*, 268 S.W.3d at 540 (“Thus aggravated assault under each distinct assaultive crime is a separate crime: aggravated assault with the underlying crime of assault by causing bodily injury and aggravated assault with the underlying crime of assault by threat.”). As a consequence, while he may be so indicted and so convicted in a subsequent case, in *this* case he must be acquitted.

E. Disposition: Outright Acquittal Rather than Reformation

1. Test

When a court of appeals has found the evidence legally insufficient to support the conviction for a greater offense, the court must consider whether reformation to a lesser-included offense is appropriate. *Thornton v. State*, 425 S.W.3d 289, 299-300 (Tex. Crim. App. 2014). The Court of Criminal Appeals outlines the reviewing court’s duty as follows:

In summary, then, after a court of appeals has found the evidence insufficient to support an appellant’s conviction for a greater-inclusive offense, in deciding whether to reform the judgment to reflect a conviction for a lesser-

included offense, that court must answer two questions: 1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense? If the answer to either of these questions is no, the court of appeals is not authorized to reform the judgment. But if the answers to both are yes, the court is authorized—indeed required—to avoid the ‘unjust’ result of an outright acquittal by reforming the judgment to reflect a conviction for the lesser-included offense.

Thornton, 425 S.W.3d at 299-300 (footnote omitted).

2. Potential Lesser-Included Offenses

Appellant can conceive of three¹⁴ potential lesser-included offenses that could apply to this case: attempted aggravated assault by threat with a deadly weapon,¹⁵ assault by threat,¹⁶ and deadly conduct.¹⁷ Although attempted aggravated assault by threat,¹⁸ assault by threat,¹⁹ and deadly conduct²⁰ are lesser-

¹⁴ Since aggravated assault based on bodily injury and aggravated assault based on threat are separate, coordinate crimes, the former cannot be a lesser-included of the latter. *See Landrian*, 268 S.W.3d at 540 (“Thus aggravated assault under each distinct assaultive crime is a separate crime: aggravated assault with the underlying crime of assault by causing bodily injury and aggravated assault with the underlying crime of assault by threat.”).

¹⁵ Tex. Pen. Code § 15.01(a); Tex. Pen. Code § 15.01(b).

¹⁶ Tex. Pen. Code § 22.01(a)(2).

¹⁷ Tex. Pen. Code § 22.05(a).

¹⁸ *See Nielson v. State*, 437 S.W.2d 862, 866 (Tex. Crim. App. 1969) (“‘Surely an ‘attempt’ is not so divorced from the completed crime that the charge of one gives no suggestion of the other.’”) (quoting *State v. Mathis*, 47 N.J. 455, 463, 221 A.2d 529, 533 (1966)); *Hill v. State*, 521 S.W.2d 253, 255 (Tex. Crim. App. 1975) (“Clearly, an indictment for the consummated offense of burglary puts a person charged on notice that he is also charged with an attempt to commit the same.”).

included offenses of the charged offense, Appellant’s conviction cannot be reformed to any of them.

With respect to the attempt lesser-included offense, there is no evidence that Appellant acted with specific intent to commit aggravated assault by threat as charged in the indictment and did “an act amounting to more than mere preparation that tend[ed] but fail[ed] to effect the commission of the offense intended.” Tex. Pen. Code § 15.01(a). There is no evidence that he tried to threaten Grayson, but failed to do so. Therefore, the conviction cannot be reformed to attempted aggravated assault by threat with a deadly weapon. *Thornton*, 425 S.W.3d at 300 (requiring appellate courts to perform “an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial” to

¹⁹ Assault is not necessarily a lesser-included offense of aggravated assault if the former is not included within the conduct charged by the offense. *Irving v. State*, 176 S.W.3d 842, 845 (Tex. Crim. App. 2005). Thus, where the indictment alleges aggravated assault with a deadly weapon by hitting the victim with a baseball bat, but the requested lesser-included offense pertains to an assault committed by “grabbing the victim and eventually falling on top of her”, “assault by means of grabbing the victim and eventually falling on top of her is not a lesser-included offense of aggravated assault by striking the victim with a bat.” *Id.* at 846. However, because the lesser-included offense at issue here would be assault by committing the same threat as charged, it is “established by proof of the same or less than all the facts required to establish the commission of the offense charged”. Tex. Code Crim. Proc. art. 37.09(1). This is, incidentally, an instance where the specific allegation of *verbal* threat, and seemingly even the specific words used, matters, because it determines what is and is not a lesser-included offense. *See Irving*, 176 S.W.3d at 846, n. 11 (“The court in *Bartholomew* reasoned that in a case where the indictment charged reckless driving and alleged the acts showing recklessness as speeding and racing, speeding and racing would be lesser-included-offenses of reckless driving. However, if the indictment had alleged the acts showing reckless driving as ‘driving in circles’ or ‘doing donuts’ in the street, speeding and racing would not be lesser-included-offenses because they would not be required to establish the charged offense.”).

²⁰ *Safian v. State*, 543 S.W.3d 216, 217 (Tex. Crim. App. 2018) (observing that the Court had “already held in *Bell v. State* that deadly conduct, as a matter of law, is a lesser-included offense of aggravated assault by threat”).

determine “whether there sufficient evidence to support a conviction for that offense”, and, if not, reformation is not authorized).

Likewise, Appellant’s conviction cannot be reformed to simple assault by threat because there is no evidence that Appellant threatened Grayson before hitting her. *Thornton*, 425 S.W.3d at 300.

Reformation to deadly conduct is similarly not possible. A person commits the offense of deadly conduct “if he recklessly engages in conduct that places another in imminent danger of serious bodily injury.” Tex. Pen. Code § 22.05(a). Because the reason deadly conduct is a lesser-included offense of aggravated assault by threat is because threatening another with a deadly weapon is equivalent to placing that person in imminent danger of serious bodily injury, *Safian v. State*, 543 S.W.3d 216, 222 (Tex. Crim. App. 2018) (“As our discussion in *Bell* indicates, when the threat of imminent bodily injury is accomplished by the use of a deadly weapon, the victim has by definition been exposed to the deadly character of the weapon and, as a result, placed in imminent danger of serious bodily injury. Thus, an allegation that the defendant committed aggravated assault by threatening another with imminent bodily injury while using a deadly weapon is functionally equivalent to engaging in conduct that places another imminent danger of serious bodily injury.”), where the proof of a threat is legally insufficient, as it is here, it necessarily follows that the actor cannot have placed the complainant in “imminent

danger of serious bodily injury”. *See Id.* While the allegation in the indictment may necessarily encompass the lesser-included offense of deadly conduct, the proof offered at trial does not. *Thornton*, 425 S.W.3d at 300 (insufficient evidence to support lesser-included offense prevents appellate court from reforming conviction to that lesser-included offense).

As a consequence, Appellant’s conviction must be reversed and a judgment of acquittal rendered in his favor, without reforming his conviction to a lesser-included offense. *Id.*

SUMMARY OF THE ARGUMENT

ISSUE TWO: The following court costs assessed against Appellant are facially unconstitutional because they violate the Separation of Powers provision of the Texas Constitution:

- a. CRCF [Clerk’s Fee—\$40.00]
- b. JRF [Jury Reimbursement Fee—\$4.00]
- c. IDF [Indigent Defense Fee—\$2.00—10% only]
- d. CRTF [Administrative Transaction Fee—\$4.00]
- e. Serving Writ [SRWT—\$35.00]

Generally speaking, a defendant may challenge court costs for the first time on appeal. Additionally, a defendant may claim for the first time on appeal that court costs are facially unconstitutional if they were neither imposed in open court

nor itemized in the judgment. Here, although the judge recited in open court that Appellant would have to pay court costs, he did not itemize those costs at that time, nor did the judgment do so, so Appellant may raise his constitutional claim now. Additionally, Appellant challenged the court costs by a timely motion (and amended motion) for new trial, which the Court overruled by written order, so although a motion for new trial is not required to preserve this type of error, Appellant preserved error through this means as well.

A court cost is facially unconstitutional for violating the Separation of Powers provision of the Texas Constitution where the cost is not directed by a statute to a legitimate criminal justice purpose. This occurs when costs are directed, without limitation, to a general fund, because monies in such funds can be used for any purpose.

In this case, each of the challenged costs, in whole or in part, is deposited into a general fund without limitation. As such, each of the challenged costs, in whole or in part, must be declared facially unconstitutional.

ARGUMENT

A. Complaining for the First Time on Appeal

A challenge to court costs may be raised for the first time on appeal. *Johnson v. State*, 423 S.W.3d 385, 391 (Tex. Crim. App. 2014); *Hurlburt v. State*, 506 S.W.3d 199, 204 & n. 3 (Tex. App.—Waco 2016, no pet.) (sustaining

challenge to the imposition, in violation of Article 102.073, of more than one court cost for more than one offense heard together in a single trial or plea proceeding, and observing, citing *Johnson*: “We note that this issue was not preserved in the trial court. The Court of Criminal Appeals has held that preservation is not required of this type of error and can be presented for the first time on appeal.”). Additionally, where the record does not show that the challenged court cost was imposed in open court or that it was itemized in the judgment, a defendant may raise his facial constitutional challenge to the court cost for the first time on appeal. *Casas v. State*, 524 S.W.3d 921, 925 (Tex. App.—Fort Worth 2017, no pet.) (observing that “[t]he court of criminal appeals has clearly resolved this issue: ‘[I]n the context of court-cost challenges[,] ... an appellant may not be faulted for failing to object when he or she was simply not given the opportunity to do so.’ *London v. State*, 490 S.W.3d 503, 507 (Tex. Crim. App. 2016)). Accordingly, because the record before this court does not show that the challenged court cost was imposed in open court or that it was itemized in the community-supervision order, Casas may raise his complaint for the first time on appeal.”). Here, because the court costs Appellant challenges was neither imposed in open court, (6 R.R. 40), nor itemized in the judgment, (I C.R. 118-119; 143-144), Appellant may raise his facial challenge to their constitutionality now for the first time on appeal. *Casas*, 524 S.W.3d at 925 (permitting a facial challenge to a court cost for the first time on

appeal); *Ingram v. State*, 503 S.W.3d 745, 748 (Tex. App.—Fort Worth 2016, pet. ref’d) (same).

Additionally, although he was not required²¹ to preserve this error through a motion for new trial, Appellant filed a timely motion (and amended motion) for new trial challenging the court costs, which the trial court overruled by written orders. (I C.R. 118; 126-129; 137-141; 143). Error is preserved for this additional reason as well.

B. A Word on the Proper Interpretation of *Peraza* and *Salinas*

1. Introduction

In the recent case of *Johnson v. State*, the Fourteenth Court of Appeals declared ninety-percent of the time payment fee to be facially unconstitutional. *Johnson v. State*, --S.W.3d--, 14-18-00273-CR, 2019 WL 438807 at *7-8 (Tex. App.—Houston [14th Dist.] Feb. 5, 2019, pet. filed) (to be published). *Johnson*, however, failed to conclude that other court costs—including those challenged here—were facially unconstitutional. *Id.* at * 2-6 (refusing to find facially unconstitutional the district clerk fee, indigent defense fee, sheriff’s fee, administrative transaction fee, and jury service fund fee).

²¹ *London v. State*, 490 S.W.3d 503, 508 (Tex. Crim. App. 2016) (“[W]e held in *Landers v. State* that a motion for new trial is not required to preserve error for a purely legal challenge to the imposition of costs.”).

The reason the Court failed to do so is because it applied the seminal Court of Criminal Appeals decision of *Salinas*²² to a “future allocation of costs” only. *Id.* at *2; 7-8. As a consequence, because of the label ascribed to the court cost, the *Johnson* court upheld them. *Id.* at *2-6.

As the author of the brief in *Johnson*, Appellant’s current counsel, aggrieved as he was, filed a petition for discretionary review with the Court of Criminal Appeals, and that petition is now pending. *See Johnson v. State*, PD-0246-19. In that petition, Appellant’s counsel argued that *Johnson* and cases reasoning similarly had misinterpreted *Salinas* and *Peraza*,²³ its predecessor. Because this Court’s resolution of the constitutional challenge to the various court costs turns on the proper interpretation of *Salinas* and *Peraza*, Appellant’s counsel poaches, in the following subsections, from his *Johnson* petition which, as he hopes, lays the debate out nicely and explains how *Salinas* and *Peraza* are to be understood.

2. Background

When the author of this brief, in other cases, joined the host of facial challenges to various court costs being mounted following *Peraza* and *Salinas*, two additional cases were in his favor: *Allen*, now pending before the Court of Criminal Appeals,²⁴ and (a different) *Johnson*, whose petition is being considered

²² *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017).

²³ *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015).

²⁴ PD-1042-18.

by the Court.²⁵ Now, *Allen* has flipped, *Allen v. State*, --S.W.3d--, 01-16-00768-CR, 2018 WL 4138965 at *10-19 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. granted) (to be published) (on rehearing, concluding that Texas Code of Criminal Procedure Article 102.011(a)(3) and (b) are not facially unconstitutional), as has *Johnson*, though without deciding the crucial issue in this case and in facial challenges in general.²⁶ *Johnson v. State*, 562 S.W.3d 168, 174-181 (Tex. App.—Houston [14th Dist.] 2018, pet. filed). Both Courts, at any rate, did not do an about face without drawing dissents. *Allen*, 2018 WL 4138965 at *10-19 (Jennings, J.,

²⁵ PD-0034-19.

²⁶ *Johnson v. State*, 562 S.W.3d 168, 180 n. 3 (Tex. App.—Houston [14th Dist.] 2018, pet. filed) (“On rehearing, the State argues that whether the relevant statutes specifically direct that the funds be spent for criminal justice purposes is not dispositive because the jury fees at issue here clearly reimburse costs incurred in the past related to criminal jury trials. According to the State, under *Peraza*, the fees are ‘directly related to the recoupment of costs of judicial resources expended in connection with the prosecution of criminal cases.’ *Peraza*, 467 S.W.3d at 517. The State posits that we may draw a distinction between certain types of court costs depending upon their intended uses. Some court costs reimburse expenses already incurred in a criminal prosecution; other court costs are to be expended to offset certain future criminal-justice costs. As the State suggests, we may reasonably read *Salinas*’s requirements as inapplicable to those costs that reimburse past expenses. If that is so, the State argues, then the jury fee is constitutional regardless whether the legislature has directed how the funds collected are to be spent. We need not address this point because we conclude that appellant has failed to meet his burden on a facial challenge even assuming *Salinas* applies.”). The Court did conclude, though, that *Salinas* did not change the test from *Peraza*. *Id.* at 179-180 (“Finally, contrary to appellant’s position, we do not construe *Salinas* as changing the test courts apply to determine whether a statute mandating the collection of fees in a criminal case is facially unconstitutional under the separation-of-powers clause...*Salinas* did not alter or lessen the burden imposed on an appellant mounting a facial challenge, nor did *Salinas* suggest that one could meet the burden by showing the possibility of some unconstitutional applications of the collected funds. See *Hawkins v. State*, 551 S.W.3d 764, 767 (Tex. App.—Fort Worth 2017, pet. ref’d) (“The *Salinas* court did not change the test we use to determine whether a statute requiring the collection of fees in a criminal case violates the Separation of Powers clause.”). For purposes of the present matter, the principal difference between *Peraza* and *Salinas* is that the challenger failed to meet his burden in the former case, but met it in the latter case.”).

dissenting on rehearing); *Johnson*, 562 S.W.3d at 181-191 (Frost, C.J., concurring and dissenting on rehearing).

Some opinions have followed *Allen* and *Johnson*.²⁷ *See, e.g., Moliere v. State*, --S.W.3d--, 14-17-00594-CR, 2018 WL 6493882, at *7 (Tex. App.—Houston [14th Dist.] Dec. 11, 2018, no pet.) (to be published) (following *Allen*); *Alvarez v. State*, --S.W.3d--, 02-18-00193-CR, 2019 WL 983750, at *5 (Tex. App.—Fort Worth Feb. 28, 2019, pet. filed) (to be published).

However, other cases remain in Appellant’s favor: *Casas*²⁸ and, curiously, *Hernandez*,²⁹ even though the latter seems squarely contradictory to the First Court of Appeals’ other panel opinion in *Allen*. *See Allen*, 2018 WL 4138965 at *15 (Jennings, J., dissenting on rehearing) (“Surprisingly, here, the majority concludes, unlike we did in *Hernandez*, that *Salinas* and its progeny are irrelevant to the instant case. And now, on rehearing, the majority strains to distinguish both *Hernandez* and *Salinas* so that it may hold that Texas Code of Criminal Procedure article 102.011(a)(3) and (b) are not facially unconstitutional.”) (footnote omitted). Neither did *Hernandez* remain undisturbed without drawing its own dissent.

²⁷ Beyond, obviously, the First and Fourteenth, out of which *Allen* and *Johnson* arose, following their own opinions.

²⁸ *Casas v. State*, 524 S.W.3d 921, 925-927 (Tex. App.—Fort Worth 2017, no pet.) (holding the emergency-services cost under Article 102.0185 facially unconstitutional under *Salinas*); *see also Robison v. State*, 06-17-00082-CR, 2017 WL 4655107, at *4-5 (Tex. App.—Texarkana Oct. 18, 2017, pet. ref’d) (mem. op., not designated for publication) (following *Casas* and striking fee imposed under Article 102.0185, but without holding the statute facially unconstitutional).

²⁹ *Hernandez v. State*, 562 S.W.3d 500, 509-511 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (holding prosecutor fee imposed under Article 102.008 facially unconstitutional under *Salinas*).

Hernandez v. State, 562 S.W.3d 500, 517-521 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (Keyes, J., dissenting from denial of rehearing). This dissent persuaded Fort Worth to decline to follow *Hernandez*, at least because of the ultimate destination of the collected court cost. See *Tyler v. State*, 563 S.W.3d 493, 503 (Tex. App.—Fort Worth 2018, no pet.) (“We agree with the dissent’s reasoning, based on its painstaking review of the interrelated statutes that direct the \$25 ultimately to payment of the prosecutor’s salary—a legitimate criminal justice purpose—and we overrule Tyler’s third point [contending that Article 102.008(a) is facially unconstitutional].”).

It is apparent, then, that there is confusion in the appellate courts as to how to apply *Peraza* and *Salinas*. But what the author of this brief cannot understand is why. *Salinas* and *Peraza*, properly understood, are saying the same thing: a court cost—whatever the statute says it is being collected for—cannot survive a separation of powers challenge if some statute does not also direct that the court cost be expended for a legitimate criminal justice purpose. The cost may be *collected* for a legitimate criminal justice purpose, but it must also be *directed to be expended* for a legitimate criminal justice purpose as well.

3. The basic problem with the reasoning of other courts

Now, some of the other appellate courts have placed constitutional court costs into two categories: “(1) statutes under which a court recoups expenditures

necessary or incidental to criminal prosecutions; and (2) statutes providing for an allocation of the costs to be expended for any legitimate criminal justice purpose.” *Johnson*, 2019 WL 438807 at *2. In doing so, however, the Courts that are against Appellant restrict *Salinas* (and, in Appellant’s counsel’s opinion, *Peraza* as well) to “future allocation of costs” only. *Johnson*, 2019 WL 438807 at *2 (“Whether a statute falls within the first category is a backward-looking exercise, while an analysis under the second category is forward-looking...The Court of Criminal Appeals has explained that whether a future allocation of costs relates to the administration of our criminal justice system depends on what the statute says about the intended use of the funds, not how the funds are actually used.”); *Allen*, 2018 WL 4138965 at *8 (“*Salinas* did not involve court costs directly related to the trial of that particular case. And, while *Peraza* expanded the category of costs that would be facially constitutional and *Salinas* explained the standard for concluding that a future allocation relates to the administration of our criminal justice system, neither case, individually or collectively, explicitly address whether a court cost linked to an expense incurred in the past in the criminal prosecution of the defendant and collected to reimburse the cost of actually expended judicial resources must also be specifically directed to a future use that is a criminal justice purpose...But that is the type of court cost being challenged here: a fee to recoup criminal justice expenses actually incurred during the prosecution of that particular

criminal defendant.”); *see also Moliere*, 2018 WL 6493882 at *5. Thus, if a cost is a recoupment of actual resources expended in the trial of that particular case, it will be upheld regardless of whether the fund collected are directed to be expended for a legitimate criminal justice purpose. *See, e.g., Allen*, 2018 WL 4138965 at *9 (“the Legislature’s failure to require that the monies be deposited into a segregated account does not make the courts tax gatherers when the fee is directly tied to reimbursement for past judicial expenses incurred in the case.”).

However, the basic error in declining to hold a court costs facially unconstitutional when a statute fails to direct the cost to be expended for a legitimate criminal justice purpose is that it confuses a necessary condition with a sufficient one. Perhaps this is nowhere better stated than in *Moliere* where—without citing to authority—the Court stated: “First, a court-cost statute need only fall within one category to be constitutional, and it falls within the first category [recoupment of expenditures that are necessary or incidental to a criminal trial] as explained above.” *Moliere*, 2018 WL 6493882 at *6. But *Peraza* and *Salinas* require more, and to see that we must discuss them briefly.

4. *Peraza* and *Salinas*

a. *Peraza*

What other courts are doing is upholding as constitutional any court cost that

contains a label suggesting it recoups judicial resources. *See, e.g., Johnson*, 2019 WL 438807 at *2-7; *Allen*, 2018 WL 4138965 at *9; *Moliere*, 2018 WL 6493882 at *6. However, *Peraza* made this only a necessary condition, not a sufficient one: “Although we noted that court costs were intended by the Legislature to be ‘recoupment of the costs of judicial resources expended in connection with the trial of the case,’ we did not intend for this statement to be dispositive of the issue before us today. The constitutional validity of the court costs in *Weir* was not at issue. We continue to hold, as we did in *Weir*, that court costs should be related to the recoupment of costs of judicial resources.” *Peraza v. State*, 467 S.W.3d 508, 517 (Tex. Crim. App. 2015) (footnote omitted) (citing *Weir v. State*, 278 S.W.3d 364 (Tex. Crim. App. 2009)). But *Peraza* did not stop there: it went on to hold that “if the statute under which court costs are assessed (or an interconnected statute) provides for an *allocation* of such court costs *to be expended* for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the separation of powers clause.” *Id.* (footnote omitted) (emphasis added).

Notice what *Peraza* said: it is not whether the costs are collected for a legitimate criminal justice purpose that determines the statute’s constitutionality, but whether they are allocated “to be expended” for a legitimate criminal justice purpose. *Id.* And that is why, when *Peraza* applied its holding to the costs before

it, *Peraza* upheld them because, by statute, the fees were required to be *expended* for a legitimate criminal justice purpose. *Id.* at 519 (“The statutory scheme allocating these resources to the criminal justice planning account are required, via interconnected statutory provisions, ***to be expended*** for legitimate criminal justice purposes.”) (emphasis added); *Id.* at 521 (“The statutory scheme allocating these resources to the state highway fund are required, via interconnected statutory provisions, ***to be expended*** for legitimate criminal justice purposes.”) (emphasis added).

Under *Peraza*, where a statute says the money is to go after collection is what counts, not what the cost is labeled nor merely whether it recoups judicial resources.

b. *Salinas*

And, of course, *Salinas* is no different. In setting forth the standard to be applied in evaluating facial challenges, the Court stated that the answer to the question of whether a court cost is collected for a legitimate criminal justice purpose “is determined by what the ***governing statute says*** about the ***intended use*** of the funds, not whether funds are actually used for a criminal justice purpose.” *Salinas v. State*, 523 S.W.3d 103, 107 (Tex. Crim. App. 2017) (emphasis added). Hence, although one fee had a name that more or less suggested a legitimate criminal justice purpose (“abused children”), *Salinas* would have none of it: “We

cannot uphold the constitutionality of funding this account through court costs on the basis of its name or its former use when all the funds in the account go to general revenue.” *Id.* at 110. Neither would *Salinas* uphold a fee with no obvious and restricted criminal justice purpose (“comprehensive rehabilitation”) just because it might help out a crime victim—and that, because “*Peraza* requires that ***the relevant statutes direct that the funds be used*** for something that is a legitimate criminal justice purpose; it is not enough that some of the funds may ultimately benefit someone who has some connection with the criminal justice system.” *Id.* at 109 n. 26 (emphasis added). *Salinas* was merely following *Peraza*, and both, as is apparent above, ask whether, when the fee is collected, a statute directs that the fee be *expended*, not just *collected*, for a legitimate criminal justice purpose. If so, then the statute is constitutional. If not, it is unconstitutional. But what does not guarantee constitutionality is the mere fact that the fee is collected for what seems to be a criminal justice purpose—that is a necessary, but not sufficient, condition. *Peraza*, 467 S.W.3d at 517. Yet that is precisely the error that the other courts are making. *See, e.g., Johnson*, 2019 WL 438807 at *2-7; *Allen*, 2018 WL 4138965 at *9; *Moliere*, 2018 WL 6493882 at *6. Appellant urges this Court not to make the same mistake.

And with that necessary excurses, we turn to the applicable law.

C. Applicable Law: Facial Challenges

1. Standard of Review and Burden in General

The constitutionality of a criminal statute is a question of law, reviewed *de novo*. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). Reviewing courts presume that the statute is valid and that the legislature has not acted unreasonably or arbitrarily. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002); *Maloney v. State*, 294 S.W.3d 613, 626 (Tex. App.—Houston [1st Dist.] 2009, pet. ref’d). The party challenging the statute has the burden to establish its unconstitutionality. *Rodriguez*, 93 S.W.3d at 69; *Maloney*, 294 S.W.3d at 626. If any reasonable construction will render the statute constitutional, the statute must be upheld. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. [Panel Op.] 1979); *see also Maloney*, 294 S.W.3d at 626.

2. Facial Challenges in Particular

The party mounting a facial challenge faces the difficult task of establishing that no set of circumstances exists under which the statute would be constitutionally valid. *State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013); *Santikos v. State*, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992) (facial challenges are the most difficult to establish). This showing “consider[s] the statute only as it is written, rather than how it operates in practice.” *Horhn v. State*, 481 S.W.3d 363, 372 (Tex. App.—Houston [1st Dist.] 2015, pet. ref’d).

A statute will be facially unconstitutional if it violates the Separation of Powers provision of the Texas Constitution, which provides:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Tex. Const. art. II, § 1.

One way this provision is violated is “when one branch of government assumes, or is delegated, *to whatever degree*, a power that is more ‘properly attached’ to another branch.” *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990) (emphasis in the original); *Ex parte Lo*, 424 S.W.3d at 28. With respect to court costs, this occurs when the courts are turned into “tax gatherers”, because in that case they are delegated power more properly attached to the executive branch. *Salinas v. State*, 523 S.W.3d 103, 107 (Tex. Crim. App. 2017). However, no constitutional violation occurs if the funds collected are directed by statute to a legitimate criminal justice purpose. *Id.* “A criminal justice purpose is one that relates to the administration of our criminal justice system. Whether a criminal justice purpose is ‘legitimate’ is a question to be answered on a statute-by-statute/case-by-case basis.” *Peraza v. State*, 467 S.W.3d 508, 517 (Tex.

Crim. App. 2015). “And the answer to that question is determined by what the governing statute says about the intended use of the funds, not whether funds are actually used for a criminal justice purpose.” *Salinas*, 523 S.W.3d at 107. The governing statute may be the statute imposing the court cost or fee, or an interconnected statute. *Peraza*, 467 S.W.3d at 517.

3. Directed to a General Fund

Court costs or fees violate the Separation of Powers provision where they are deposited without limitation into a general fund. *Hernandez v. State*, 562 S.W.3d 500, 509-511 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (prosecutor’s fee under Article 102.008(a) of the Texas Code of Criminal Procedure “unconstitutional to the extent it allocates funds to the county’s general fund because those funds allow spending for purposes other than legitimate criminal justice purposes in violation of the separation of powers provision of the Texas Constitution”). This is because “[m]oney in a county’s [or city’s] general fund can be spent for ‘any proper county [or city] purpose.’” *Id.* at 510 (quoting Tex. Att’y Gen. Op. No. JM-530 (1986)). Any funds deposited in such general funds without limitation, then, can be spent “for purposes other than legitimate criminal justice purposes in violation of the [S]eparation of [P]owers [clause] of the Texas Constitution.” *Id.* at *511; *see also Salinas*, 523 S.W.3d at 110 (“We cannot uphold the constitutionality of funding th[e] [“abused children’s counseling”]

account...when all the funds in the account go to [the State's] general revenue.”). Because of this infirmity, a statute that fails to direct the funds to be used for a legitimate criminal justice purpose will operate “unconstitutionally every time the fee is collected, making the statute unconstitutional on its face.” *Hernandez*, 562 S.W.3d at 511 (quoting *Salinas*, 523 S.W.3d at 109, n. 26). The statute is not saved by the possibility that the fee “may ultimately be spent on something that would be a legitimate criminal justice purpose”, since this “is not sufficient to create a constitutional application of the statute because the actual spending of the money is not what makes a fee a court cost.” *Id.* (quoting *Salinas*, 523 W.23d at 109, n. 26).

D. Applicable Law: Court Costs Challenged

1. District Clerk Fee

Article 102.005(a) mandates that a “defendant convicted of an offense in a county court, a county court at law, or a district court shall pay for the services of the clerk of the court a fee of \$40.” Tex. Code Crim. Proc. art. 102.005(a). In this case, Appellant was assessed a fee of \$40.00 with the label “CRCF”, (I Suppl. C.R. 3), which clearly imposes a fee under Article 102.005.

2. Serving Writ Fee

Among the fees challenged here is a “SRWT”, or serving writ fee, in the amount of \$35.00. (I Suppl. C.R. 3). Neither the bill of costs nor the judgment

specifies which statute authorizes this fee, (I C.R. at 118; 143) (I Suppl. C.R. 3), but the applicable statute is Article 102.011 of the Texas Code of Criminal Procedure. Tex. Code Crim. Proc. art. 102.011; *Camacho v. Samaniego*, 831 S.W.2d 804, 812 (Tex. 1992) (“The only fees that the sheriff may collect in criminal matters are enumerated in Code of Criminal Procedure sections 102.001 and 102.11.”).³⁰ Article 102.011 authorizes the following fees:

(a) A defendant convicted of a felony or a misdemeanor shall pay the following fees for services performed in the case by a peace officer:

(1) \$5 for issuing a written notice to appear in court following the defendant's violation of a traffic law, municipal ordinance, or penal law of this state, or for making an arrest without a warrant;

(2) \$50 for executing or processing an issued arrest warrant, capias, or capias pro fine with the fee imposed for the services of:

(A) the law enforcement agency that executed the arrest warrant or capias, if the agency requests of the court, not later than the 15th day after the date of the execution of the arrest warrant

³⁰ Despite the language in *Camacho* noting Article 102.001 as a possible source of authority for sheriff's fees, which includes a capias fee, it has been plausibly argued in (and received to some extent with favor by) this Court that, based on statutory amendments, Article 102.001 has no continuing validity. *Love v. State*, 03-15-00462-CR, 2016 WL 1183676 at *1, n. 1 (Tex. App.—Austin Mar. 22, 2016, no pet.) (mem. op., not designated for publication); *Whary v. State*, 03-16-00737-CR, 2017 WL 2333266 at *2, n. 2 (Tex. App.—Austin May 24, 2017, no pet.) (mem. op., not designated for publication); *Davis v. State*, 03-16-00334-CR, 2017 WL 2333205 at *2, n. 1 (Tex. App.—Austin May 25, 2017, no pet.) (mem. op., not designated for publication).

or capias, the imposition of the fee on conviction;
or

(B) the law enforcement agency that processed the arrest warrant or capias, if:

(i) the arrest warrant or capias was not executed; or

(ii) the executing law enforcement agency failed to request the fee within the period required by Paragraph (A) of this subdivision;

(3) \$5 for summoning a witness;

(4) \$35 for serving a writ not otherwise listed in this article;

(5) \$10 for taking and approving a bond and, if necessary, returning the bond to the courthouse;

(6) \$5 for commitment or release;

(7) \$5 for summoning a jury, if a jury is summoned; and

(8) \$8 for each day's attendance of a prisoner in a habeas corpus case if the prisoner has been remanded to custody or held to bail.

(b) In addition to fees provided by Subsection (a) of this article, a defendant required to pay fees under this article shall also pay 29 cents per mile for mileage required of an officer to perform a service listed in this subsection and to return from performing that service. If the service

provided is the execution of a writ and the writ is directed to two or more persons or the officer executes more than one writ in a case, the defendant is required to pay only mileage actually and necessarily traveled. In calculating mileage, the officer must use the railroad or the most practical route by private conveyance. The defendant shall also pay all necessary and reasonable expenses for meals and lodging incurred by the officer in the performance of services under this subsection, to the extent such expenses meet the requirements of Section 611.001, Government Code. This subsection applies to:

- (1) conveying a prisoner after conviction to the county jail;
- (2) conveying a prisoner arrested on a warrant or capias issued in another county to the court or jail of the county; and
- (3) traveling to execute criminal process, to summon or attach a witness, and to execute process not otherwise described by this article.”

Tex. Code Crim. Proc. art. 102.011(a)-(b).

Presumably, the \$35.00 “SRWT” fee imposed here, (I Suppl. C.R. 3), refers to a fee collected under Article 102.011(a)(4) only. Tex. Code Crim. Proc. art. 102.011(a)(4) (authorizing a \$35 fee “for serving a writ not otherwise listed in this article”).

3. Jury Reimbursement Fee

Here, Appellant was charged a \$4.00 fee under the category of “JRF”, (I

Suppl. C.R. 3), which corresponds to the fee mandated by Article 102.0045(a): “[a] person convicted of any offense, other than an offense relating to a pedestrian or the parking of a motor vehicle, shall pay as a court cost, in addition to all other costs, a fee of \$4 to be used to reimburse counties for the cost of juror services as provided by Section 61.0015, Government Code.” Tex. Code Crim. Proc. art. 102.0045(a).³¹

4. Indigent Defense Fee

The bill of costs imposes a \$2.00 fee for “IDF”, (I Suppl. C.R. 3), which is intended to cover the indigent defense fee mandated by Texas Local Government Code Section 133.107: “A person convicted of any offense, other than an offense relating to a pedestrian or the parking of a motor vehicle, shall pay as a court cost, in addition to other costs, a fee of \$2 to be used to fund indigent defense representation through the fair defense account established under Section 79.031, Government Code.” Tex. Loc. Gov’t Code § 133.107(a).

5. Administrative Transaction Fee

Appellant was assessed an Administrative Transaction Fee (“CRTF”) in the amount of \$4.00, (I Suppl. C.R. 3), which corresponds to two impositions of the fee authorized by Article 102.072: “An officer listed in Article 103.003 or a

³¹ This fee cannot be a jury fee under Article 102.004(a) because the amount authorized by that statute (\$40.00) does not correspond to the amount (\$4.00) that Appellant was charged. Tex. Code Crim. Proc. art. 102.004(a) (“...A defendant convicted by a jury in...a district court shall pay a jury fee of \$40.”); (I Suppl. C.R. 3).

community supervision and corrections department may assess an administrative fee for each transaction made by the officer or department relating to the collection of fines, fees, restitution, or other costs imposed by a court. The fee may not exceed \$2 for each transaction.” Tex. Code Crim. Proc. art. 102.072; *see Ireland v. State*, 03-14-00615-CR, 2015 WL 4914732 at *1-2 (Tex. App.—Austin Aug. 12, 2015, no pet.) (mem. op., not designated for publication) (analyzing challenge to “Administrative Transaction Fee” as attacking fee assessed under Article 102.072).

E. Cost Destination for Each Court Cost

1. District Clerk Fee

The clerk’s fee is not directed by statute to a particular destination. *See* Tex. Code Crim. Proc. art. 102.005. In such a case, we can look to the Office of Court Administration study³² relied upon by, for example, the First Court of Appeals. *See Hernandez*, 562 S.W.3d at 510; *see also Salinas*, 523 S.W.3d at 110 & n. 36 (relying on Comptroller’s website to support its statutory analysis). The Office of Court Administration’s study³³ notes that “100% [of the fee goes] to the County

³² <http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf>

³³ It is helpful to view this study, but not necessary, since the statute itself, or an interconnecting statute, must direct the funds to a legitimate criminal justice purpose—and not just to a general fund—or else the statute will be facially unconstitutional. *Salinas v. State*, 523 S.W.3d 103, 110 & n. 36 (Tex. Crim. App. 2017) (relying on the Comptroller’s website in support of its conclusion that the statute is facially unconstitutional, noting: “One of the dissents suggests that we decide the constitutionality of the portion of the fee devoted to the abused children’s counseling account on the basis of information we observed on a website. The dissent is incorrect. The fee is unconstitutional because the funds are not directed by statute to be used for a criminal justice purpose. *See supra* at n.26. The comptroller’s website simply illustrates the

General Fund.” Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014) at *Study to Repeal Certain Court Costs and Fees—Criminal Court Costs in Effect as of September 1, 2014*; Page 5; Fee No. 8 (“Clerk’s Fee”).

2. Serving Writ Fee

Likewise, the serving writ fee is also deposited into the general fund. *Id.*, Page 5; Fee No. 9 (“Peace Officer Fee—Executing or Processing an issued Arrest Warrant, Capias, or Capias Pro Fine”). And, although the statute suggests that the fee should be remitted to the law enforcement agency that either executed or processed the arrest warrant or capias, Tex. Code Crim. Proc. art. 102.011(a)(2), as the study points out: “The intent of the statute is to reimburse peace officers for their work in connection with the case. However, the money is directed to the General Fund (at both the State and local level. [sic] Thus, the money need not be spent only on law enforcement.” Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014) at *Study to Repeal Certain Court Costs and Fees—Criminal Court Costs in Effect as of September 1, 2014*; Page 5; Fee No. 9 (“Peace Officer Fee— Serving a Writ not otherwise listed in article 102.011”).

3. Jury Reimbursement Fee

consequences of the legislature’s lack of direction. We also observe that the dissent has not suggested that the content on the comptroller’s website is inaccurate.”).

This fee is “to be used to reimburse counties for the cost of juror services as provided by Section 61.0015, Government Code”, Tex. Code Crim. Proc. art. 102.0045(a), and “[t]he comptroller shall deposit the fees in the jury service fund.” Tex. Code Crim. Proc. art. 102.0045(b). However, it appears that ninety-percent of this always ultimately ends up in a general revenue fund where it may be used for any purpose. *See* Revenue Object 3704—Court Costs—Jury Reimbursement Fees, <https://fmcpa.cpa.state.tx.us/fiscalmoa/rev.jsp?id=15185> (“Deposit Funds 0001—General Revenue Fund”); Appropriated Fund 0001 – General Revenue Fund, <https://fmcpa.cpa.state.tx.us/fiscalmoa/fund.jsp?num=0001#lookups>; *see Salinas*, 523 S.W.3d at 110 & n. 36 (“The Comptroller’s website says that the money collected for abused children’s counseling is deposited in the General Revenue Fund.”). As for the remaining ten percent, via an interconnected statute the “county may retain 10 percent of the money collected from fees as a service fee for the collection if the...county remits the remainder of the fees to the comptroller within the period prescribed by Section 133.055(a).” Tex. Loc. Gov’t Code § 133.058(a); Tex. Code Crim. Proc. art. 102.0045(b) (“The clerk of the court shall remit the fees collected under this article to the comptroller in the manner provided by Subchapter B, Chapter 133, Local Government Code.”). Section 133.055(a) requires the county to remit fees collected to the comptroller and file a corresponding report. Tex. Loc. Gov’t Code § 133.055(a). Thus, as the Office of

Court Administration’s study observes, ten percent of the juror reimbursement fee may go “as a service for collection to the County General Fund (or City General Fund)”, while the “state money gets directed to the ‘Jury Service Fund.’” Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014) at *Study to Repeal Certain Court Costs and Fees—Criminal Court Costs in Effect as of September 1, 2014*; Page 16; Fee No. 35 (“Juror Reimbursement Fee”).

4. Indigent Defense Fee

Most of this fee, which is the “Indigent Defense Fee” mandated by Texas Local Government Code Section 133.107, is “to be used to fund indigent defense representation through the fair defense account established under Section 79.031, Government Code”, Tex. Loc. Gov’t Code § 133.107(a), and the “comptroller shall credit the remitted fees to the credit of the fair defense account established under Section 79.031, Government Code.” Tex. Loc. Gov’t Code § 133.107(b); Tex. Gov’t Code § 79.031(1)-(2) (“The fair defense account is an account in the general revenue fund that may be appropriated only to: (1) the commission for the purpose of implementing this chapter; and (2) the office of capital and forensic writs for the purpose of implementing Subchapter B, Chapter 78.”). However, ten percent of the fee collected may go “as a service fee for collection to the County General Fund (or City General Fund)”, while the “State money gets directed to the ‘Fair

Defense Account’ established under section 79.031 of the Government Code.”

Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014) at *Study to Repeal Certain Court Costs and Fees—Criminal Court Costs in Effect as of September 1, 2014*; Page 19; Fee No. 42 (“Indigent Defense Fee”); Tex. Loc. Gov’t Code § 133.107(b) (“The treasurer shall remit a fee collected under this section to the comptroller in the manner provided by Subchapter B.”); Tex. Loc. Gov’t Code § 133.055(a); Tex. Loc. Gov’t Code § 133.058(a).

5. Administrative Transaction Fee

The statute authorizing an administrative fee of up to \$2 does not state where the money collected is to be directed. Tex. Code Crim. Proc. art. 102.072. The Office of Court Administration’s study observes that “100% of the money stays with the County and is directed to the County’s General Fund”, and that “there is no requirement that the money be directed to the collecting entity.”

Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014) at *Study to Repeal Certain Court Costs and Fees—Criminal Court Costs in Effect as of September 1, 2014*; Page 30; Fee No. 69 (“Transaction Fee”).

F. Application

1. Clerk's Fee,³⁴ Serving Writ Fee, and Administrative Transaction Fee

Because each of these fees goes to a general fund without limitation, each statute mandating the fees' collection is facially unconstitutional under *Hernandez* and *Casas*. *Hernandez*, 562 S.W.3d at 511 (prosecutor's fee under Article 102.008(a) of the Texas Code of Criminal Procedure "unconstitutional to the extent it allocates funds to the county's general fund because those funds allow spending for purposes other than legitimate criminal justice purposes in violation of the separation of powers provision of the Texas Constitution"); *Casas*, 524 S.W.3d at 925-927 (holding Article 102.0185 of the Texas Code of Criminal Procedure to be unconstitutional where the "monies collected" for "emergency-services cost" are allocated to the general revenue fund).

In an unpublished opinion, the Seventh Court of Appeals has upheld the administrative transaction fee, *Hogan v. State*, 07-18-00189-CR, 2019 WL 2462343, at *2 (Tex. App.—Amarillo June 12, 2019, no pet. h.) (mem. op., not designated for publication), but the Court relies on case (*Johnson* and *Moliere*), for example, whose interpretation of *Peraza* and *Salinas* is questioned above. *Id.* Moreover, *Hogan* upheld the administrative transaction fee because it is a "recoupment of criminal prosecution expenses" since it imposed on Appellant

³⁴ Both the recent *Johnson* decision from the Fourteenth Court of Appeals as well as the First Court's decision in *Davis v. State*, 519 S.W.3d 251, 257 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) have upheld the clerk's fee, but the former interpreted *Salinas* and *Peraza* improperly, as noted earlier in the argument section for this issue, and *Davis* was decided before *Salinas*, making it inapposite.

because he was convicted. *Id.* On the one hand, this makes little sense: *every* court cost is imposed on a defendant because he was convicted, so that cannot be the standard for determining its constitutionality. On the other, “recoupment of criminal prosecution expenses” is, as explained above, *Peraza* made this a necessary, but not a sufficient, condition for the validity of a criminal court cost: “Although we noted that court costs were intended by the Legislature to be ‘recoupment of the costs of judicial resources expended in connection with the trial of the case,’ we did not intend for this statement to be dispositive of the issue before us today. The constitutional validity of the court costs in *Weir* was not at issue. We continue to hold, as we did in *Weir*, that court costs should be related to the recoupment of costs of judicial resources.” *Peraza v. State*, 467 S.W.3d 508, 517 (Tex. Crim. App. 2015) (footnote omitted) (citing *Weir v. State*, 278 S.W.3d 364 (Tex. Crim. App. 2009)). But *Peraza* went further, holding that “if the statute under which court costs are assessed (or an interconnected statute) provides for an *allocation* of such court costs *to be expended* for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the separation of powers clause.” *Id.* (footnote omitted) (emphasis added). So *Hogan* cannot be the last word on the constitutionality of the administrative transaction fee.

2. Jury Reimbursement Fee

Since under the statute ninety-percent of the fee for jury reimbursement is supposed to end up in a “jury service fund” with the comptroller, Tex. Code Crim. Proc. art. 102.0045(b), to be used to reimburse counties for the money they spend reimbursing jurors for their service, Tex. Gov’t Code § 61.0015(c), it would seem that this part of the fee would easily withstand a facial challenge. However, in *Salinas*, notwithstanding the fact that the statute required some of the funds collected to go to the “abused children’s counseling” account, because of a series of “legislative actions”, the “account originally funded a program for abused children’s counseling, [but] the program to which the funds are directed no longer exists and the funds revert to the General Revenue Fund.” *Salinas*, 523 S.W.3d at 110. Consequently, after noting that “[t]he Comptroller’s website says that the money collected for abused children’s counseling is deposited in the General Revenue Fund”, *Id.*, the Court of Criminal Appeals concluded: “We cannot uphold the constitutionality of funding this account through court costs on the basis of its name or its former use when all the funds in the account go to general revenue.” *Id.*

In this case, perusing the Texas Comptroller’s website discloses that the jury reimbursement fee in fact goes into a general revenue account with a Classification of “Group 01: General State Operating and Disbursing Funds”, which, hovering the cursor over the question mark in brackets shows it is “Used to make general

expenditures for the daily operations of state government.” *See* Revenue Object 3704—Court Costs—Jury Reimbursement Fees, <https://fmcpa.cpa.state.tx.us/fiscalmoa/rev.jsp?id=15185> (“Deposit Funds 0001—General Revenue Fund”); Appropriated Fund 0001 – General Revenue Fund, <https://fmcpa.cpa.state.tx.us/fiscalmoa/fund.jsp?num=0001#lookups>; *Salinas*, 523 S.W.3d at 110 & n. 36 (“The Comptroller’s website says that the money collected for abused children’s counseling is deposited in the General Revenue Fund.”). Thus, it appears that, as in *Salinas*, even though the statute would otherwise provide for a legitimate criminal justice purpose, the constitutionality of the juror reimbursement fund cannot be upheld “on the basis of its name or its former use when all the funds in the account go to general revenue.” *Salinas*, 523 S.W.3d at 110. Here, then, as in *Salinas*, “the allocation of funds to the [jury service fund] account does not currently qualify as an allocation of funds to be expended for legitimate criminal justice purposes.” *Id.* at 110 (quotation omitted). Although, unlike in *Salinas*, the juror reimbursement program seems to be ongoing,³⁵ it remains true that all the funds collected go to a general revenue account, without

³⁵ *Salinas*, 523 S.W.3d at 110 (“The result of these legislative actions is that, although the ‘abused children’s counseling’ account originally funded a program for abused children’s counseling, the program to which the funds are directed no longer exists and the funds revert to the General Revenue Fund.”). “Unlike in *Salinas*”, because from *Salinas*’ summary of the “legislative actions”, it is not at all clear to this writer that the abused children’s account, so far as the statutes disclose, is no longer in operation, but the majority determined it was not, and perhaps the dissenter was right to conclude that this was “because of information the Majority observed on a website.” *Salinas*, 523 S.W.3d at 114 (Yeary, J., dissenting).

limitation, where they may be used for any purpose. Appropriated Fund 0001 – General Revenue Fund, <https://fmcpa.cpa.state.tx.us/fiscalmoa/fund.jsp?num=0001#lookups> (the purpose of the general revenue fund into which the juror reimbursement fee ultimately goes is “To receive those revenues directed to be deposited to the General Revenue Fund and those revenues for which a specific fund has not been designated; such revenues to be used as the Constitution prescribes and the Legislature directs.”). Thus, this ninety-percent of the fee is facially constitutional under *Salinas*.³⁶

³⁶ In *Salinas*, one of the dissenters criticized the majority opinion, saying that it invalidated part of the consolidated court cost statute “because of information the Majority observed on a website.” *Salinas*, 523 S.W.3d at 114 (Yeary, J., dissenting). In response, the Court wrote: “The dissent is incorrect. The [abused children’s counseling account] fee is unconstitutional because the funds are not directed by statute to be used for a criminal justice purpose. *See supra* at n. 26. The comptroller’s website simply illustrates the consequences of the legislature’s lack of direction. We also observe that the dissent has not suggested that the content on the comptroller’s website is inaccurate.” *Salinas*, 523 S.W.3d at 110, n. 36. However, in reading the body of the *Salinas* opinion, this writer cannot discern (but perhaps he misreads it) that the *Salinas* majority did anything but follow a trail of legislative activity that resulted in the abused children’s counseling account fee going to an abused children’s counseling account, then to a foundation school fund, then back to an abused children’s counseling account, with the majority somehow (because of the statute?) determining that “no program was created for which the account would be used.” *Id.* at 109-110. In other words, by statute the abused children’s counseling account court cost *did* seem to be directed to a legitimate criminal justice purpose, but the majority, because of the Comptroller’s website (and notwithstanding its assertion to the contrary in footnote 36 of the majority opinion), concluded “[w]e cannot uphold the constitutionality of funding this account through court costs on the basis of its name or its former use when all the funds in the account go to general revenue.” *Id.* at 110. Thus, Judge Yeary’s point might be well-taken, which is why Appellant is emboldened to assert that, despite what the statute says about the allocation of the juror reimbursement fee, this Court “cannot uphold [its] constitutionality...on the basis of its name or its former use when all the funds in the account go to general revenue.” *See Id.* If Appellant has misread *Salinas*, then only 10% of the juror reimbursement fee is potentially challengeable.

Hernandez, 2017 WL 3429414 at *7; *Casas*, 524 S.W.3d at 925-927; *Johnson*, 2018 WL 1476275 at *4-5.

But so is the remaining ten percent. Either the county retains this portion, to be deposited into a general revenue fund where it may be used for any purpose,³⁷ Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014) at *Study to Repeal Certain Court Costs and Fees—Criminal Court Costs in Effect as of September 1, 2014*; Page 16; Fee No. 35 (“Juror Reimbursement Fee”) (ten percent of the juror reimbursement fee may go “as a service for collection to the County General Fund (or City General Fund)”), which will make that portion facially unconstitutional, *see Salinas*, 523 S.W.3d at 111 (invalidating portion of consolidated court costs statute as facially unconstitutional and reducing court cost owed by 9.8306 percent), or the county remits the entire portion to the comptroller, where it is deposited in a general revenue account as described above, making one-hundred percent, not ninety-percent, facially unconstitutional under *Salinas*. *Hernandez*, 562 S.W.3d at 511; *Casas*, 524 S.W.3d at 925-927.

3. Indigent Defense Fee

In contrast to the last fee, ninety-percent of this one appears to go to a

³⁷ Tex. Code Crim. Proc. art. 102.045(b); Tex. Loc. Gov’t Code § 133.055(a); Tex. Loc. Gov’t Code § 133.058(a).

legitimate criminal justice purpose in more than name only. *See* GR Account 5037—GR Account—Fair Defense, <https://fmcpa.cpa.state.tx.us/fiscalmoa/fund.jsp?num=5073> (“Account in the General Revenue Fund...”).³⁸ Here, the funds go into an actual account that, while part of a general revenue fund, is earmarked for a particular purpose: it does not go into a general revenue fund without limitation. *Id.* By contrast, the juror reimbursement fee goes into the general revenue fund without limitation, meaning it can be used for any purpose. *Hernandez v. State*, 2017 WL 3429414 at *6.

But, as with the juror reimbursement fee, ten percent of the indigent defense fee may be retained by the county and deposited into general fund. Office of Court Administration, *Study of the Necessity of Certain Court Costs and Fees in Texas* (Sept. 1, 2014) at *Study to Repeal Certain Court Costs and Fees—Criminal Court Costs in Effect as of September 1, 2014*; Page 19; Fee No. 42 (“Indigent Defense Fee”) (ten percent may be retained by the county “as a service fee for collection to the County General Fund (or City General Fund)”; Tex. Loc. Gov’t Code § 133.107(b) (“The treasurer shall remit a fee collected under this section to the comptroller in the manner provided by Subchapter B.”); Tex. Loc. Gov’t Code §

³⁸ The Comptroller’s webpage does not refer to the indigent defense fee, and instead mentions the consolidated court cost fee, but does mention the Government Code statute establishing the fair defense account. Tex. Gov’t Code § 79.031. However, since by statute the indigent defense fee is to be deposited into the fair defense account, Tex. Loc. Gov’t Code § 133.107(a)-(b), and since such an account actually exists, the webpage’s failure to mention the right statute does not affect the analysis.

133.055(a); Tex. Loc. Gov't Code § 133.058(a). This provision, then, is facially unconstitutional under *Salinas*. *Salinas*, 523 S.W.3d at 111 (invalidating portion of consolidated court costs statute as facially unconstitutional and reducing court cost owed by 9.8306 percent); *Hernandez*, 562 S.W.3d at 511; *Casas*, 524 S.W.3d at 925-927.

G. Conclusion

The infirmity in each of the challenged costs is that the fee collected, in whole or in part, is directed to a general fund, which may be used for any purpose. This type of allocation renders the statute facially unconstitutional. As a result, the trial court's judgment must be modified to delete the unconstitutional court costs, which should result in a reduction of \$85.00.

SUMMARY OF THE ARGUMENT

ISSUE THREE: Should this Court modify the judgment to reduce the amount of money owed, the withdrawal order must be modified accordingly so as to give effect to this Court's conclusions.

When a withdrawal order is challenged in a direct appeal of a criminal conviction, and the modification of that withdrawal order is necessary to effectuate the decision of the appellate court, the appellate court may modify that withdrawal order.

In this case, the withdrawal order commands that certain payments be deducted from Appellant's Inmate Trust Account until release or the total sum of \$259.00 is paid. Should the Court agree, however, that some of the monies from the judgment or bill of costs should not be imposed on Appellant, the withdrawal order must be modified to effectuate the Court's decision.

ARGUMENT

A. Law

“On notification by a court, the department shall withdraw from an inmate's account any amount the inmate is ordered to pay by order of the court under this subsection.” Tex. Gov't Code § 501.014(e). While collection proceedings under 501.014(e) are civil in nature, *see Harrell v. State*, 286 S.W.3d 315, 316 (Tex. 2009) and *Armstrong v. State*, 340 S.W.3d 759, 764 & n. 7 (Tex. Crim. App. 2011), a 501.014(e) withdrawal order may be modified on direct appeal from a criminal conviction where modification is necessary to effectuate the conclusions and decisions of the appellate court. *Hill v. State*, 06-12-00163-CR, 2013 WL 1750902 at *5 (Tex. App.—Texarkana Apr. 24, 2013, no pet.) (mem. op., not designated for publication) (“The general principles of *Pfeiffer* and *Holmes* suggest that, because we are faced with a direct appeal of a criminal conviction, we also have the authority to modify a withdrawal order in such a case. This direct appeal is just such a case. The need to modify the withdrawal order stems directly from

our resolution of the evidentiary sufficiency challenge to the court costs in a direct appeal and is vital to ensure the implementation of our conclusions. Hill’s notice of appeal gave us jurisdiction over the entire case; and, although post-conviction collection efforts are civil matters, we conclude that we have jurisdiction to modify the withdrawal order.”).

B. Application

In this case, the district judge signed a withdrawal order under 501.014, ordering that payment be made for the sum of \$259.00 under various alternative conditions. (I C.R. 116). Should, then, this Court agree on at least one of those issues, modifying the withdrawal order will be “vital to ensure the implementation of [this Court’s] conclusions.” *Hill*, 2013 WL 1750902 at *5. Accordingly, this Court has jurisdiction to modify the withdrawal order, and should do so to give effect to its decision.

SUMMARY OF THE ARGUMENT

ISSUE FOUR: The judgment contains the following clerical errors that should be modified to make the record speak the truth:

- a. The “degree of offense” recites that Appellant was convicted of a first-degree felony, when the degree of his offense is, in fact, a second-degree felony;

- b. The judgment shows pleas of “True” to the enhancements when Appellant pleaded “Not True” to both enhancements.

This Court has the authority to correct error in a judgment when brought to the Court’s attention by any source. Here, the judgment describes the offense degree as a first-degree felony. However, when we apply the relevant statutes we see that Appellant’s offense degree was a second-degree felony punished as a first-degree felony, not a first-degree felony itself. Instead, the offense *degree* level was a second-degree felony, while the offense *punishment* level was raised to a first-degree felony. As such, the judgment should be reformed to reflect that Appellant was convicted of a second-degree felony, not a first-degree felony.

The judgment also reflects that Appellant pleaded “true” to both enhancement paragraphs, when he in fact pleaded “not true”. As such, the judgment should be modified accordingly.

ARGUMENT

A. Law and Application

The Texas Rules of Appellate Procedure give this Court the authority to reform judgments when necessary. Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993) (appellate court has the power to modify incorrect judgments when the necessary data and information are available to do so); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *Hall v.*

State, 494 S.W.3d 390, 392 (Tex. App.—Waco 2015, no pet.); *Rhoten v. State*, 299 S.W.3d 349, 356 (Tex. App.—Texarkana 2009, no pet.). It is necessary to reform an incorrect judgment “to make the record speak the truth”. *French*, 830 S.W.2d at 609. The Court’s “authority to reform incorrect judgments is not dependent on the request of any party, nor does it turn on a question of whether a party has or has not objected in trial court; [the Court] may act sua sponte and may have a duty to do so.” *Dolph v. State*, 440 S.W.3d 898, 908 (Tex. App.—Texarkana 2013, pet. ref’d) (citation omitted).

Article 42.01 requires a judgment to contain, among other things, the “degree of offense for which the defendant was convicted”. Tex. Code Crim. Proc. art. 42.01, Sec. 1(14). Here, the primary offense is a second-degree felony, Tex. Pen. Code § 22.02(a)(2); Tex. Pen. Code § 22.02(b); (I C.R. 5), but because Appellant’s prior convictions were found true, (I C.R. 118; 143) (6 R.R. 40), the punishment level was raised to that of a first-degree felony. Tex. Pen. Code § 12.42(d) (“if it is shown on the trial of a felony offense other than a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be *punished* by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years

or less than 25 years.”) (emphasis added). The offense level remained the same, but the punishment level, and the punishment level only, was increased: “As noted above, in *Webb* we recognized that Penal Code Section 12.42 increases the range of punishment applicable to the primary offense; it does not increase the severity level or grade of the primary offense.” *Ford v. State*, 334 S.W.3d 230, 234 (Tex. Crim. App. 2011) (citing *State v. Webb*, 12 S.W.3d 808, 811, 811 n. 2 (Tex. Crim. App. 2000)). As such, the judgment errs to reflect a conviction for a first-degree felony, and instead should be reformed to reflect a conviction for a second-degree felony. *Ford*, 334 S.W.3d at 234; *Bigley*, 865 S.W.2d at 27–28; *French*, 830 S.W.2d at 609; Tex. Code Crim. Proc. art. 42.01, Sec. 1(14); Tex. Pen. Code § 22.02(a)(2); Tex. Pen. Code § 22.02(b); Tex. Pen. Code § 12.42(d).

The judgment also reflects that Appellant pleaded “true” to both enhancements, (I C.R. 118; 143), but the reporter’s record shows that he in fact pleaded “not true”. (6 R.R. 12). Accordingly, the judgment should be modified to correct this clerical error by reflecting pleas of “not true” to both enhancements. *Runels v. State*, 03-18-00036-CR, 2018 WL 6381537, at *11 (Tex. App.—Austin Dec. 6, 2018, pet. ref’d) (mem. op., not designated for publication) (“Accordingly, we modify the district court's judgment of conviction to reflect that Runels entered a plea of ‘not true’ to the second enhancement allegation (burglary of a vehicle) and that the jury found the allegation to be ‘true.’”).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant asks this Court to REVERSE AND RENDER a judgment of acquittal. In the alternative, Appellant asks this Court to MODIFY the judgment by REDUCING the amount of court costs owed by \$85.00; to MODIFY the withdrawal order to reduce the total sum ordered to be paid by the amount the Court finds should not be imposed on Appellant; to MODIFY the judgment to reflect the correct offense level; to MODIFY the judgment to reflect the correct plea to the enhancement paragraphs; and to AFFIRM the judgment as modified.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Rule 9.4(i) of the Texas Rules of Appellate Procedure, Appellant's Brief contains 15,000 words, exclusive of the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, and certificate of compliance.

/s/ Justin Bradford Smith
Justin Bradford Smith

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2019, a true and correct copy of Appellant's Brief is being or will be forwarded to the counsel below by email and/or eservice:

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